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IN THE

Supreme Court of the United States

EARTHY D. DANIELS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

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QUESTION PRESENTED

Whether a defendant may use 28 U. S. C. § 2255 to challenge his sentence based on a claim that the expired state convictions used to enhance his sentence under the ACCA are constitutionally invalid?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, defendant seeks to escape the sentencing effect of multiple prior convictions based on a claim he could have brought long ago and which cast little, if any, doubt on his

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

actual guilt of the priors. Such evasion of habitual criminal sentencing is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Earthy Daniels was convicted of possession of a firearm by a felon. See Brief for Petitioner 1-2. The sentencing court found he had four prior convictions for violent felonies: first-degree burglary in California in 1977 and 1979[2] and robbery in 1978 and 1981. J. A. 14. The court found that an allegation of a prior juvenile adjudication for burglary was not sustained. J. A. 14-15. Application of the Armed Career Criminal Guideline made the adjusted offense level 31 instead of 22, for a guideline range of 188-235 months instead of 84-105 months. J. A. 12, 15. The actual sentence, with a further departure for time in state custody, was 176 months, *i.e.*, 14 years, 8 months. J. A. 18.

The sentencing court declined to consider any challenges to the priors, citing *Custis* v. *United States*, 511 U. S. 485 (1994). J. A. 13 Following affirmance on appeal, see *United States* v. *Daniels*, 86 F. 3d 1164 (CA9 1996) (Table), Daniels filed a motion under 28 U. S. C. § 2255 attacking the priors. J. A. 20-57. The District Court found that the attack on the priors was precluded by the Ninth Circuit's interpretation of *Custis* in *Clawson* v. *United States*, 52 F. 3d 806 (CA9 1995) and *Contreras* v. *Schiltgen*, 151 F. 3d 906 (CA9 1998). J. A. 64-65. On appeal, the Ninth Circuit affirmed on the same basis. *United States* v. *Daniels*, 195 F. 3d 501, 503 (CA9 1999).

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2. At the times of these offenses, first degree was burglary of a dwelling at night. See Cal. Stat. 1976, ch. 1139, § 206.5; Cal. Stat. 1978, ch. 579, § 23. The nighttime requirement has since been repealed. Cal. Stat. 1982, ch. 1290, § 1.

SUMMARY OF ARGUMENT

Enhanced sentencing for habitual criminals is an important component of society's effort to protect innocent people. Priors should not be disregarded for sentencing on any ground that does not gravely undermine our confidence in actual guilt of the prior offense.

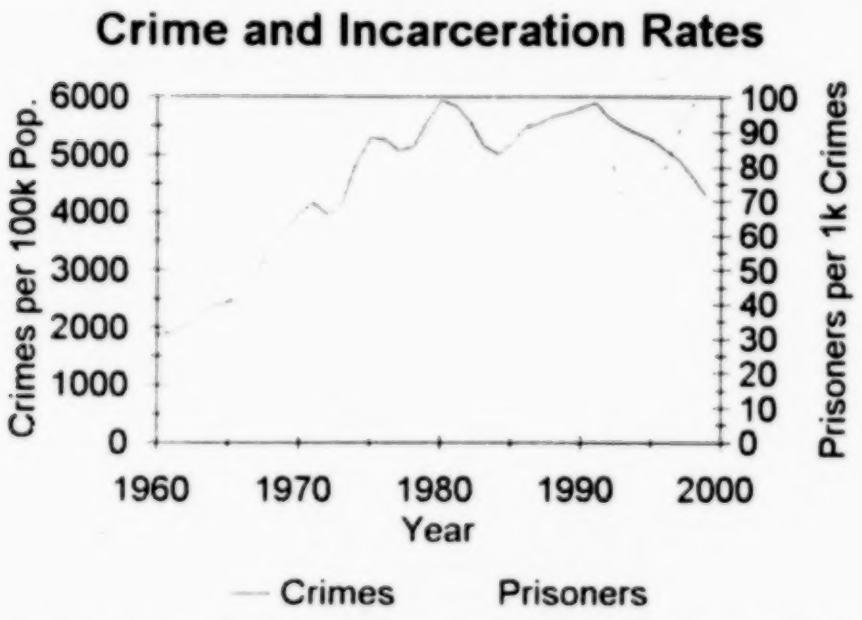
The grounds for attacking a judgment are not fixed, but rather diminish at each stage of proceedings. The impact of a particular claimed error on reliability of the result is a major factor in deciding how long to allow the claims. *Custis* v. *United States* considered and rejected the argument that collateral attacks on priors must be allowed for constitutional claims other than *Gideon* error. Claims such as those in the present case cast little doubt on guilt of the priors, and neither law nor justice requires that they be entertained.

ARGUMENT

I. For the protection of innocent people, society must identify and restrain habitual criminals.

A. The Harm Done by Habitual Criminals.

At long last, America is making progress against crime. As the solid line in Figure 1 shows, the rate of FBI Index Crime has fallen 28% from the 1980 peak of 5,950.0 index crimes per 100,000 population to 4,266.8 in 1999. See Federal Bureau of Investigation, Crime in the United States 1999, p. 64 (2000) (1980-1999 data). While this is progress, we have much further to go, as a comparison with the 1960 rates shows. The rates of forcible rape and robbery each remain about 3.4 times the respective 1960 rates. Compare *ibid.*, with U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 3.120, p. 266 (2000) (1960-1998 data). That means about 246,000 people were robbed and



63,000 were raped who would not have been if crime rates were at 1960 levels.

Crime is a complex problem with multiple causes and hence no one solution. The criminal justice system is responsible for one vital component of a multi-front attack on crime: punishment. The importance of this component must not be underestimated. The dotted line in Figure 1 shows the strength of sentencing policy as measured by the number of criminals in custody relative to the crime rate. Sourcebook, *supra*, Table 6.43, at 516 (data for graph). Lenient sentencing in the 1960s and 1970s was followed by a skyrocketing crime rate, and tougher sentencing from the 1980s forward was followed by a dropping crime rate. This is not a coincidence. See Scheidegger & Rushford, The Social Benefits of Confining Habitual Criminals, 11 Stan. L. & Pol'y Rev. 59, 60 (1999).

There are three primary purposes of punishment: retribution, deterrence, and incapacitation. Retribution is the subject of endless philosophical debates, see, *e.g.*, 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5(a)(6), p. 36, n. 44

(1986), while deterrence is the subject of empirical debates, *id.*, at 34, n. 27. Incapacitation, however, is not debatable. So long as five-time felon Earthy Daniels is confined in prison, he will not be breaking into the homes of law-abiding citizens, and he will not be robbing them, although he may commit crimes on other prisoners. Nor will anyone "take his place" committing robbery and burglary, because there is no fixed number of places to take. See Scheidegger & Rushford, 11 Stan. L. & Pol'y Rev., at 60.

If society is going to take criminals off the street, it can either do so indiscriminately by raising penalties across the board, or it can impose longer sentences on those it believes most likely to commit further crimes if released. The latter, selective approach is both less expensive to society and less severe in its treatment of those given the lesser sentences. "[P]unishing first offenders with twenty-five year sentences does not deter crime as much as it ruins lives." *Deal* v. *United States*, 508 U. S. 129, 146, n. 10 (1993) (Stevens, J., dissenting) (quoting *United States* v. *Jones*, 965 F. 2d 1507, 1521 (CA8 1992)). Both justice and efficacy require focusing on career criminals.

Research has long established that a fairly small percentage of criminals commit a disproportionate share of the crimes. H. R. Rep. 99-849, p. 2 (1986) (report on Career Criminal Amendments Act of 1986, summarizing research). One study noted that "incarcerating one robber who is above the 90th percentile for one year would prevent more robberies than incarcerating 18 offenders who are below the median for the same period of time." P. Greenwood, Selective Incapacitation 45-47 (1982).

Identification of the "high-rate" offenders is no small task, however. While they freely "self-report" in confidential interviews with researchers, *id.*, at 14-15, they are obviously not going to speak freely during sentencing. Furthermore, there are moral and constitutional restraints on the factors that can be used in sentencing. Even if research were to find a correlation

between growing up in a broken home and recidivism, for example, it would be obviously unjust to base a sentence on a factor beyond one's control.

Criminal record is the single most important factor in identifying the career criminal. Common sense, backed up by research, indicates that felons with multiple convictions are more likely to commit new crimes upon release.

> "It is a psychological truism that the best predictor of future behavior is past behavior. Not surprisingly, one of the best predictors of future criminal conduct is past criminal conduct, and the parole-prediction literature amply supports this fact. From the earliest studies [citations] to the latest [citations], indices of prior criminal conduct consistently are found to be among the most powerful predictors of parole violations, arrest for the commitment of new offenses, and conviction and reincarceration for these." Gottfredson & Gottfredson, Accuracy of Prediction Models, in 2 Criminal Careers and "Career Criminals" 239-240 (A. Blumstein ed. 1986).

Enhancement for prior convictions is based on an objective, previously adjudicated fact, and it is based on the defendant's voluntary, antisocial choice to commit the prior crime. The predictive power of a criminal record to forecast future recidivism is obviously far from perfect. See, *e.g.*, Greenwood, *supra*, at 66. However, there is no other factor for differentiating among people who have committed similar crimes which satisfies as well the concurrent requirements of objectivity, moral basis, and prediction of future recidivism. Consequently, every jurisdiction in the United States has enacted some kind of habitual criminal statute. *Parke* v. *Raley*, 506 U. S. 20, 26-27 (1992) (citing Department of Justice, Statutes Requiring the Use of Criminal History Record Information 17-41 (1991) (NJC-129846)). This Court has long recognized the states' strong and legitimate interest in punishing repeat offenders. *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Raley*, 506 U. S., at 27.

For a system based on prior crimes to be just and even-handed, it must reliably identify those prior crimes. A limitation to prior convictions, rather than unadjudicated prior conduct, is for the defendant's benefit even though the Constitution does not require this limitation. See *Nichols* v. *United States*, 511 U. S. 738, 747-748 (1994). But if the priors are thrown out on fortuitous circumstances having little or no connection with the defendant's guilt of the prior crime, then the evenhandedness of the system is compromised. For example, in *Parke* v. *Raley*, the Sixth Circuit had created a rule which, in effect, would throw out virtually all prior convictions where the transcript of the *Boykin*[3] colloquy had been lost, destroyed, or never made. This Court wisely rejected that rule. 506 U. S., at 30.

Congress has provided, in 28 U. S. C. § 2255, a mechanism for challenging criminal judgments on grounds which cannot be raised on appeal because they require facts outside the appellate record. See *United States* v. *Hayman*, 342 U. S. 205, 212 (1952) (habeas for "facts *dehors* the record"); *id.*, at 219 (scope of § 2255 intended to be the same as habeas). Claims which could have been raised on appeal, but were not, generally cannot be raised in a § 2255 proceeding. See *Reed* v. *Farley*, 512 U. S. 339, 354 (1994). Claims raised on appeal and resolved against the appellant will generally not be reconsidered as well. See *Kaufman* v. *United States*, 394 U. S. 217, 227, n. 8 (1969); *Withrow* v. *Williams*, 507 U. S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (collecting cases). Yet petitioner now proposes to convert this proceeding into an open-ended attack on *prior* judgments on grounds that were or could have been raised and decided long ago. In the typical case, the defendant has had or waived his appeal on the prior. He has filed or foregone his collateral attack, if he was incarcerated. He has been back on the street and committed a new felony, and *now* he wants to reopen the long-closed book

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3. *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

on the prior crime, placing a further burden on a system already groaning under a surfeit of litigable issues. Such a step would require an exceptionally compelling justification.

B. Striking Priors and Unjust Results.

"Striking" a prior conviction, so as to disregard it for sentencing purposes, is fundamentally different from reversing a judgment on appeal or even from granting habeas corpus relief. On appeal or habeas, the grant of relief typically does not, by itself, result in the defendant's release. The usual result is a retrial. A conviction may be more difficult to obtain after a long lapse of time, see *Vasquez* v. *Hillery*, 474 U. S. 254, 280 (1986) (Powell, J., dissenting), but it is quite often possible, particularly where the original case was strong.

Striking priors is different. The remedy typically sought is to resentence the defendant without considering the prior offense. See, *e.g.*, J. A. 51-52 (relief sought in District Court in the present case). From a finding of procedural irregularity alone, the defendant completely escapes the sentence-enhancing effect of his prior crime. He would be sentenced as a first offender regardless of how clear the evidence of guilt of the prior may be. This is a truly drastic remedy, and it can have disastrous consequences.

For example, in California the mid-term penalty for a first-offense rapist is 6 years, Cal. Penal Code § 264(a), with up to 15 percent worktime credit. See *id.*, § 2933.1(a). A second offense of forcible rape draws 25-to-life. See *id.*, § 667.61(a), (c)(1), (d)(1). Striking the prior means that a serial rapist who should have been locked up for life instead gets released in 5 years to brutalize more women.

The criminal career of Andre Brigham Young, presently before this Court in *Seling* v. *Young*, No. 99-1185, illustrates the dire consequences of failure to adequately punish repeat offenders. See *In re Young*, 857 P. 2d 989, 994-995 (Wash. 1993). Despite a prior conviction on four counts of rape,

Young served only three years for the fifth. The attack on victim number six should never have happened. The cause of this travesty was lax sentencing laws, but the same consequence would follow from a needlessly stricken prior conviction.

In *Parke* v. *Raley*, *supra*, 506 U. S., at 32, this Court noted the state's "legitimate interest in differentially punishing repeat offenders." Although true, this is a dry understatement. The "interest" here goes to the very lives of the people victimized by habitual criminals. Innocent people will be needlessly robbed, raped, and murdered if criminals who are, in fact, recidivists are wrongly sentenced as first offenders. That is what is at stake in this case.

II. Neither law nor justice requires the consideration of petitioner's claims.

In habeas cases, the statute requires the court to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. Although § 2255 does not contain the same language, the same requirement is implicit from its purpose as a habeas substitute. See *supra*, at 7.[4] For claims which are not fundamental, neither law nor justice requires the reexamination of long-final judgments.

Res judicata is the general rule of the American legal system. A final judgment on the merits conclusively settles the claims and issues determined. See *Montana* v. *United States*, 440 U. S. 147, 153 (1979). An adverse determination is binding against the nonprevailing party in any court, regardless of how erroneous it may have been. In *Montana*, relitigation of a federal constitutional question was precluded even in this Court and even against the United States government. *Id.*, at

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4. On one point we agree with petitioner. There is no basis to give federal prisoners any less review under § 2255 than state prisoners receive under § 2254. See Brief for Petitioner 19. If there were to be any difference, federalism concerns would point the other direction.

164. Exceptions to the rule require strong justification. Existing exceptions should not be extended without careful consideration of whether the extension is warranted.

A. Judgments: Void, Voidable, Erroneous and Correct.

Judgments are not cleanly divided into "valid" and "invalid" judgments. Instead, they lie along a spectrum of vulnerability. At one end of the spectrum is the judgment which is absolutely void. Normally the only defect severe enough to cause absolute voidness is a lack of jurisdiction. Imprisonment under such a judgment would itself be a crime. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

At the other extreme are the vast majority of judgments. They have been validly rendered by courts of competent jurisdiction in proceedings free of reversible error. Such judgments will be affirmed if they are appealed and will be enforced in the face of any collateral attack.

The middle of the spectrum consists of judgments rendered erroneously by courts of competent jurisdiction. These judgments differ from each other in their degree of vulnerability. Some types of errors may be attacked at some stages of the process but not at others. A judgment may have been entered after the erroneous admission of an important piece of evidence. Such a judgment would be reversible on appeal. In most cases, however, it would not be vulnerable to collateral attack.[5] If no appeal is taken or if the judgment is affirmed on appeal, even erroneously, the judgment is no longer subject to question.

More fundamental defects will result in a judgment being "voidable," i.e., subject to being set aside in a collateral attack such as habeas corpus. Such a judgment is nonetheless "valid"

5. This is true even if the ground for exclusion is the Fourth Amendment. Such a claim will not be considered on federal habeas if the state provides an opportunity for full and fair litigation of the claim. *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976).

in the sense that executive officers may properly execute it until such time as it is actually set aside. The legislative branch may attach civil disabilities, enforceable by criminal sanctions, which also apply until the judgment is actually set aside. *Lewis* v. *United States*, 445 U. S. 55, 67 (1980) (firearm possession by felon).

The status of a judgment as "voidable" is not necessarily static. Upon successful completion of habeas corpus proceedings, the judgment becomes void rather than merely voidable. See *id.*, at 61, n. 5. On the other hand, the right to challenge a judgment may be lost by the passage of time, see 28 U. S. C. § 2244(d); Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, or by the failure to invoke the usual appellate remedies, see *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

B. Reliability and Procedural Defaults.

Petitioner repeatedly inveighs against "unconstitutional" prior convictions, as if "constitutional" and "fundamental" were synonymous. See Brief for Petitioner 7-15. Arguably, they should be. One might well argue that the detailed code of criminal procedure judicially engrafted on to the Bill of Rights, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156 (1970), should never have been promulgated. It is far too late in the day, though, to pretend that all the rules now considered constitutionally based are actually essential to the fundamental fairness of the trial. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

As Justice Stevens noted, the key to recognizing which rules really are essential to reliability of the result can be found in the jurisprudence of retroactivity. If compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) were really essential to the reliability of trials in which confessions are used, why were all other defendants in then-pending cases denied the benefits of the decision? See *Johnson* v. *New Jersey*, 384 U. S.

719, 721 (1966). The reason is that the Court did not believe that noncompliance with its rule cast genuine doubt on the reliability of the guilt verdict. See *id.*, at 727-728 (distinguishing *Gideon* and *Jackson* v. *Denno*, 378 U. S. 368 (1964), which applied retroactively due to " 'clear danger of convicting the innocent' "). Ernesto Miranda, unlike Clarence Gideon, was convicted on retrial. See L. Baker, Miranda: Crime, Law and Politics 191-193 (1983). The defendants in the three joined cases were also reconvicted or plea bargained. See *id.*, at 191-192, n. *. That is why "it is familiar learning that all 'claims of constitutional error are not fungible.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 640 (1993) (Stevens, J., concurring).

Of all the constitutional rules which apply to the guilt phase of trial, the one which is least needed for reliability of the verdict is the Fourth Amendment exclusionary rule. See *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). The impact of this rule on reliability is actually negative. The runner-up in this category is the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969). To gauge the impact of *Boykin* on reliability, one need only ask any experienced trial judge how many defendants have changed their minds upon being "Boykinized" and decided to go to trial. Most will answer "none." Cases in which compliance with *Boykin* makes any difference at all to the outcome are exceedingly rare. Typically, the only effect of noncompliance with *Boykin* is to hand the defendant a ground for challenging a plea he would have entered anyway.

Along the same lines is the rule defendant seeks to invoke in this case, that the judge taking a guilty plea advise the defendant of the nature of the change. See Brief for Petitioner 2-3. In most cases, this exercise merely repeats what defense counsel has already told the defendant. See *Henderson* v. *Morgan*, 426 U. S. 637, 647 (1976). Defendant himself illustrates the disconnection of this rule from reliability of the result by asserting, "It does not matter if a defendant probably would have pled guilty anyway." J. A. 51. *Amicus* submits that

it matters in deciding whether to extend twice-removed collateral attacks to such claims.

The implicit theme of defendant's argument is that all constitutional claims must be considered at all stages of criminal proceedings. That is not the law. Claims drop off as the processes move on, and their impact on confidence in actual guilt is often a key factor. In answer to Judge Friendly's rhetorical question, innocence *is* relevant.

The exclusionary rule falls off first, because of its uniquely contra-reliability effect. See *Stone* v. *Powell*, *supra*, 428 U. S., at 490. Next come rules created after the date of finality of defendant's case on direct review which do not "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). Defendants with such claims are denied relief, and they remain in prison even though their convictions, in petitioner's terminology, are "unconstitutional." Then, strongly analogous to the present case, there are claims which could have been raised on appeal but were not. These are generally not cognizable on habeas, with an exception for actual innocence. See *Schlup* v. *Delo*, 513 U. S. 298, 326-327 (1995). Finally, there are claims in which the probability of a different result rises to the level of reasonable doubt but not to the level of substantial and injurious effect. These claims warrant reversal on direct appeal but not on habeas corpus. *Brecht* v. *Abrahamson*, *supra*, 507 U. S., at 638.

Collateral attack on a prior conviction, as opposed to the present conviction, is a step further removed, and it makes sense that fewer attacks be allowed at this very late stage. Again, impact on reliability should be the key. Defects in the prior proceedings have no impact whatever on the reliability of the present conviction. The specter of the imprisoned innocent man, which haunts so many habeas opinions, is absent here. The issue is only how long to imprison a criminal, not whether he *is* a criminal. The worst-case injustice on the defendant's side is an order of magnitude less than it is with guilt-phase

claims. Cf. *Schlup*, *supra*, 513 U. S., at 325-326 (contrasting claim of actual innocence with claim of "too severe" sentence).

The question, then, is where to draw the line on cognizable claims. Given the zero impact on reliability of the present guilt judgment, and given that the defendant could have challenged his priors when they were rendered, does it make any sense to open these judgments to the same full range of claims as are cognizable in a habeas attack on the present convictions? *Amicus* believes that question was asked and answered in *Custis* v. *United States*, 511 U. S. 485 (1994). The answer is no.

C. Custis v. United States.

When *Custis* v. *United States*, 511 U. S. 485 (1994) was being briefed and argued, the advocates involved understood that the case was about whether, not when, priors may be collaterally attacked. Defendant referred to the position of the Fourth Circuit and the government as a "prohibition on court review of nearly all constitutional violations." Brief for Petitioner in *Custis* v. *United States*, No. 93-5209, p. 25. The government argued, "At some point, a state court judgment becomes final and is *no longer open* to challenge on grounds that the defendant has not preserved." Brief for United States in *Custis* v. *United States*, No. 93-5209, p. 22 (emphasis added); see also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Custis* v. *United States*, No. 93-5209, pp. 2-3.

The *Custis* majority also saw the issue this way, as indicated by both the language of the opinion and the manner in which it addressed the constitutional precedents. On the constitutional question, the two principal precedents cited by defendant were *Burgett* v. *Texas*, 389 U. S. 109 (1967) and *United States* v. *Tucker*, 404 U. S. 443 (1972). See *Custis*, 511 U. S., at 493. If the case were about timing of challenges, these precedents would be quite different, while if it were about allowability they would be quite similar. In *Burgett*, defendant challenged the

use of priors on *Gideon*[6] grounds during the course of the trial, see 389 U. S., at 112, and the case came to this Court on direct appeal. See *id.*, at 110. *Tucker*, on the other hand, involved a proceeding under 28 U. S. C. § 2255, many years after the original conviction. See 404 U. S., at 445.

If the issue in *Custis* had been merely whether Custis could bring his challenge in the sentencing proceedings or had to delay them to a § 2255 motion, the only relevance of *Tucker* would have been to illustrate the propriety of the latter course. *Custis* would not have needed to distinguish *Tucker* on any basis other than the differing procedural positions of the two cases. Instead, though, the *Custis* Court treated *Burgett* and *Tucker* as equivalent on the point at issue. The Court distinguished both cases on the ground that they involved *Gideon* claims and that *Gideon* was a "unique constitutional defect." *Custis*, 511 U. S., at 496.

Custis took a further step toward recognizing that constitutional claims differ in their impact on fundamental fairness and that this difference ought to result in differing degrees of reviewability. This concept is highly controversial, and the members of this Court have differed sharply on it. Compare *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting) ("claims of constitutional error are not fungible"), with *Stone* v. *Powell*, *supra*, 428 U. S., at 515 (Brennan, J., dissenting) ("there are no 'second class' constitutional rights for purposes of federal habeas jurisdiction"). This step would have been completely unnecessary if the question had merely been a choice between sentencing and § 2255 as the vehicle for the challenge. Under well-settled law, there is nothing remotely unconstitutional about channeling constitutional challenges to one procedural vehicle rather than another. See, *e.g.*, *Yakus* v. *United States*, 321 U. S. 414, 443-444 (1944); *United States* v. *Hayman*, 342 U. S. 205, 223-224, and n. 40 (1952) (upholding § 2255's displacement of habeas corpus).

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6. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

If *Custis* had been merely a choice-of-procedure case, there would have been no need to distinguish *Gideon* claims from others, particularly on the basis of *Gideon*'s uniqueness and jurisdictional nature. See *Custis*, 511 U. S., at 496. Dividing constitutional claims in this manner without a need to do so would violate the principle that constitutional questions are not to be decided unless necessary to resolve the case, see *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585, 589-590 (1991) (quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1908)), and then no broader or more novel than necessary. See *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). *Custis* distinguished *Gideon* claims from others because it needed to. It distinguished *Tucker* on this basis, rather than the narrower and better-settled ground of *Yakus* and *Hayman*, because the question was allowability, not timing or procedure.

"Custis argues that regardless of whether § 924(e) permits collateral challenges to prior convictions, the *Constitution* requires that they be *allowed*." 511 U. S., at 493 (emphasis added). Any argument that the Constitution requires one vehicle rather than another would have been frivolous and would have been brushed off with a single paragraph. The argument made by Custis and rejected by the Court was that the Constitution requires some vehicle for attacking priors on non-*Gideon* grounds. "Custis invites us to extend the right to attack collaterally prior convictions used for sentenced enhancement beyond . . . *Gideon*. We decline to do so." *Id.*, at 496. Both by its terms and by its rationale, this holding applies to collateral attack generally, not to the choice of one collateral vehicle over another.

At the end of the opinion, *after* reaching this conclusion, the Court noted that a prisoner still in custody on a prior conviction could attack that prior on habeas. See *id.*, at 497. The Court reserved the question of whether a § 2255 motion would lie to reopen an enhanced sentence after such a prior had actually been vacated in another proceeding. See *ibid.* Nothing in this

passage says or implies that the § 2255 motion itself could be the vehicle for collaterally attacking the prior. The qualification that the prisoner must still be in custody under the prior very strongly implies the contrary.

The *Custis* Court did not mention the possibility of habeas attack on the state prior until after it had rejected Custis's argument. Nothing in its rationale depends on the circumstance of such an attack remaining available. The question reserved in this paragraph is whether a sentence can be reopened after the prior has otherwise been vacated, not whether a motion to vacate the present sentence can be used to collaterally attack the prior. The latter question is indistinguishable from the argument rejected in *Custis*.

D. Law and Finality.

In a state-prisoner habeas proceeding, the law authorizes relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). In federal prisoner cases, relief is authorized if "the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack . . . . " 28 U. S. C. § 2255. In the context of the present case, that means the same scope as § 2254. See *Kaufman* v. *United States*, 394 U. S. 217, 221-223 (1969) (§§ 2254 and 2255 have same scope for constitutional claims); *United States* v. *Frady*, 456 U. S. 152, 166, n. 17 (1982) (procedure default rule; finality interest same as state cases).

The question here is whether the government violates the Constitution by treating a final judgment as truly final and refusing to entertain a new attack on it. In other words, is res judicata unconstitutional? Even if *Custis* had not already answered the question, the answer would still be no.

The procedural default cases establish that a judgment may be regarded as legitimate despite an underlying constitutional

defect. The habeas petitioner "is in custody *pursuant* to a judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 730 (1991) (emphasis in original). If the state courts have legitimately refused to entertain an attack on that judgment because the claim has been defaulted, the judgment "rests on an adequate and independent state ground." *Ibid.* Despite the defect, the judgment is a "legitimate reason[ ] for holding the prisoner." *Ibid.* When the state has provided a means for reviewing judgments and the defendant has not used it, his custody is not in violation of the Constitution within the meaning of the habeas statute. See *Brown* v. *Allen*, 344 U. S. 443, 485 (1953).

Judgments on prior convictions should be treated similarly. When the jurisdiction rendering the judgment provides corrective process and the defendant does not invoke it within the time required, the judgment should stand as the conclusive resolution of the question of the defendant's guilt. For most constitutional claims, the end of custody will be the outer limit for bringing the claim, although the rendering jurisdiction may choose to entertain later claims. See *Johnson* v. *Mississippi*, 486 U. S. 578, 586-587 (1988) (sentence reopened after rendering jurisdiction set aside prior judgment).

In short, general principles of finality support treating final judgments as conclusive. An exception to the general principles would be warranted if there were compelling, countervailing considerations of fundamental justice. Cf. *Schlup* v. *Delo*, 513 U. S. 298, 321 (1995) (actual innocence as exception to procedural default). There are none here.

E. Basic Justice.

Faced with a claim of a procedural defect in a prior judgment, there are three possible responses: (1) entertain the claim and, if sustained, disregard the prior crime regardless of actual guilt; (2) refuse to entertain the claim, recognizing there is some possibility, however remote, defendant might be innocent of the prior crime; or (3) retry the question of guilt of the prior crime. The third alternative presents obvious difficulties of resources,

stale evidence, and often great inconvenience to far away witnesses.[7] If the choice is between the first two alternatives, the choice must depend in part on the degree to which a procedural defect undermines our confidence in the accuracy of the determination of guilt. Cf. *Teague* v. *Lane*, 489 U. S. 288, 313 (1989) (plurality opinion) (accuracy enhancing value as basis of distinguishing retroactive from nonretroactive rules); *Strickler* v. *Greene*, 527 U. S. 263, 289-290 (1999) (confidence in verdict as criterion for denying relief for nondisclosure of evidence).

Petitioner's claims in the present case illustrate why attacks on guilty pleas seldom undermine confidence in the defendant's actual guilt of the prior offense. He contends that his only involvement in the 1978 robbery was being in the getaway car. J. A. 52. Habeas petitioners as a group have long been notorious for saying whatever they need to say. See *United States* v. *Hayman*, *supra*, 342 U. S., at 217, n. 25. Daniels claims he did not know this was insufficient for guilt of robbery, his lawyer did not tell him, J. A. 53, and the transcript of the plea hearing is missing. J. A. 38, n. 3.

This story defies belief. This case does not involve some esoteric aspect of mens rea that scholars debate. This is a gut-level matter of culpability, or lack of it. Even the most uneducated person would recognize that basing guilt of a felony on merely being a passenger in a car is fundamentally wrong and would at the very least ask his lawyer about it. The likelihood that a person who was actually innocent under these circumstances would go ahead and plead guilty, and that his lawyer would allow him to, seems extremely remote.

Defendant's second attack does even less to undermine confidence in actual guilt. He claims ineffective assistance in

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7. Notwithstanding these difficulties, *amicus* suggests that, if the Court should decide to allow these attacks, defendant should be required to show that he is innocent of the prior offense by the preponderance of the evidence.

failure to make a suppression motion. J. A. 48. Justice Powell has questioned whether such claims establish "prejudice" even in an attack on the present conviction, see *Kimmelman* v. *Morrison*, 477 U. S. 365, 394-398 (1986) (opinion concurring in the judgment), an issue which has yet to be resolved. If the case for entertaining such claims in an attack on the present conviction is weak, the case for entertaining them in attacks on priors is nearly nonexistent. Such a claim does not undermine confidence in the correctness of the present judgment at all. Defendant is a habitual criminal regardless of whether a prior attorney missed an opportunity to obtain an undeserved windfall for him.

Petitioner notes, correctly, that defendants may forego attacking a conviction at the proper time because of a plea bargain. See Brief for Petitioner 21. Indeed, this is probably the single most prevalent reason for foregoing collateral attacks on convictions. The vast majority of convictions are guilty pleas. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 5.51, p. 454 (2000). Far from being an argument to entertain challenges to such priors, this is a reason *not* to entertain them.

A typical plea bargain involves a plea to a lesser offense or fewer offenses than the defendant actually committed or a stipulation to a sentence less than he would likely receive upon full proceedings. A defendant who does not receive such consideration has no tangible incentive to plead guilty. The obvious reason why the defendant does not attack the plea-bargain judgment is that he knows he has gotten off easy. If he overturns the judgment, he will likely be tried, convicted, and sentenced for the full measure of the crimes he actually committed.

The plea bargain is a mutual agreement of the defendant and the state to bring an end to the case. The state receives a termination of the case with a savings of its resources, and the defendant receives a termination of the possibility of the full sentence for the offenses originally charged. Finality concerns

have special force in guilty plea cases, *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979), in part because the danger of convicting an innocent person is vastly diminished. See *ibid.* In addition, the defendant has chosen to hasten the finality of the case, and he has typically received consideration for it.

The flood of extra attacks on sentences that petitioner envisions, see Brief for Petitioner 23-24, is unlikely to happen. It is not true that "all prisoners would be well-advised to mount every imaginable challenge." Cf. *id.*, at 24. Most would be subject to retrial on more charges, more serious charges, or heavier sentences if they succeeded in overturning their present judgments, and that consequence would typically outweigh the remote, contingent possibility that the conviction might someday be used for enhancement.

A person who has been wrongfully convicted has a simple and fully effective way to avoid the use of that conviction for enhancement. All he has to do is obey the law. If he does not commit a new offense, the prior will never be used for enhancement.

In summary, a fully expired prior conviction, which is attacked on grounds similar to those in the present case, and which the defendant never challenged when he had a procedure available, is highly unlikely to involve actual innocence of the prior conviction. It has no bearing whatever on guilt of the present offense and the interest in preventing injustice is greatly diminished when issues go only to sentence and not to guilt. The arguments that justify an exception to res judicata in other contexts are insufficient here. The general rule should apply. The final judgment should be regarded as conclusive and not reopened.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation